UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
ROGER BARBER, d/b/a	)	**DOCKET NO. CWA-05-2005-0004**
BARBER TRUCKING	)	
	)	
RESPONDENT	)	

INITIAL DECISION

Pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), Roger Barber d/b/a Barber Trucking is assessed a civil administrative penalty of $60,000 for violations of Section 405(e) of the CWA, 33 U.S.C. § 1345(e), and its implementing regulations found at 40 C.F.R. part 503, "Standards for the Use or Disposal of Sewage Sludge."

Issued: May 11, 2007

Before: Barbara A. Gunning
Administrative Law Judge

Appearances:

For Complainant: Eaton Weiler, Esquire
Jeffrey A. Cahn, Esquire
U.S. EPA, Region V
Office of Regional Counsel
77 W. Jackson Boulevard (C-14J)
Chicago, IL 60604-3590

For Respondent: Roger Barber, *pro se*
119 S. High Street
Mt. Orab, OH 45154

Decision on Liability on part of Count II and on Counts III and IV, I expressly took Respondent's *pro se* status into account. Order on Complainant's Motion for Accelerated Decision on Liability at 12-14. Moreover, given that Complainant did not attach any documents to support the allegations in its Motion for Accelerated Decision on Liability, this Tribunal's ruling turned on whether Respondent had clearly admitted liability in his pleadings.[5/] *Id*. Even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *Roberts v. Browning,* 610 F.2d 528, 536 (8th Cir. 1979). Accordingly, I held that Complainant had not sustained its burden to prove that there was no genuine issue of material fact for Counts III and IV and the portion of Count II alleging failure to develop and maintain information on the Nitrogen Requirement.

Following the parties' submission of their prehearing exchanges in this matter, an Order Scheduling Hearing was issued on December 20, 2005. That Order directed the parties to file a joint set of stipulated facts, exhibits, and testimony by April 7, 2006. The hearing was scheduled to begin on Tuesday, April 25, 2006 in Cincinnati, Ohio.

On January 10, 2006, Respondent submitted a Motion for Dismissal ("Respondent's Motion for Dismissal") that was simply a one sentence request for dismissal without any supporting argument:

> Respondent makes a motion as outlined in 40 C.F.R. 22.20 Code of Federal Re[g]ulations to request dismissal of ½ of Count II, Count III, and Count IV on the basis of failure to establish a prima facie case or other grounds

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[5/] The Order on Complainant's Motion for Accelerated Decision on Liability emphasizes that a motion for accelerated decision is akin to a motion for summary judgment, as the party filing the motion (i.e., the "movant") has the burden of showing that no genuine issue of material fact exists. Order on Complainant's Motion for Accelerated Decision on Liability at 2-4. Furthermore, it explains that in considering such a motion, the Presiding Officer must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *Id*. at 2. Summary judgement on a matter is inappropriate when contradictory inferences may be drawn from the evidence. *Id*. at 3.

Respondent does not cite to any evidence in the record." Motion to Strike at 3. Complainant is not persuasive. There is some evidence in the form of Respondent's testimony to support this assertion of fact. This motion is **DENIED**.

In paragraph 6, Complainant moves to strike Respondent's assertion that: "as the testimony proved[,] local health departments know nothing of Rule 503." Reply Br. at 2. Complainant argues that "[w]ithout agreeing that some individuals at some health departments are not informed of the requirement of part 503, there is no evidence in the record (and Respondent does not cite to any evidence) that local health departments in the area, or in general, are not aware of the requirements of part 503." Motion to Strike at 4. Complainant is not persuasive. There is some evidence in the form of Respondent's testimony, as well as the testimony of several other witnesses, to support this assertion of fact. This motion is **DENIED**.

In paragraph 7, Complainant moves to strike Respondent's assertion that: "I think some phone calls to Highland, Clermont, Adams, and all Southwestern County Health Department would end the arguments about who has received information and knows about Rule 503." Reply Br. at 2-3. Complainant argues that "to the extent Respondent is attempting to make a factual assertion about the knowledge of individuals in the named health departments, this factual assertion finds no basis in the record." Motion to Strike at 4. Complainant is not persuasive, as this statement is more appropriately characterized as an argument rather than a statement of fact. This motion is **DENIED**.

In paragraph 8, Complainant moves to strike Respondent's assertion that: "most counties to our East, including Highland, are land applying year round unable to cover their sewage the same as the two Brown County sites were, unaware of Rule 503 which could be followed for a few dollars per load, if they were informed about it." Reply Br. at 3-4. Complainant argues that "[w]ithout agreeing that Respondent was unable to cover septage at the Barber Trucking disposal site, and without agreeing that part 503 could be 'followed for a few dollars per load,' there is no evidence in the record that septage haulers, in '[m]ost counties to our East, including Highland, [who] are land applying year round [are] unable to cover their sewage.'" Motion to Strike at 4. Complainant is not persuasive, as this statement is more appropriately characterized as an argument rather than a statement of fact. This motion is **DENIED**.

III. DISCUSSION

> includes, but is not limited to, domestic septage; scum or solids removed in primary, secondary, or advanced wastewater treatment processes; and a material derived from sewage sludge . . .

40 C.F.R. § 503.9(w).

"Domestic sewage," a term used within the definition of sewage sludge, is defined as, "waste and wastewater from humans or household operations that is discharged to or otherwise enters a treatment works." 40 C.F.R. § 503.9(g). Under 40 C.F.R. § 503.9(aa), a "treatment works" is "either a federally owned, publicly owned, or privately owned device or system used to treat (including recycle and reclaim) either domestic sewage or a combination of domestic sewage and industrial waste of a liquid nature." Also included in the definition of sewage sludge, *inter alia*, is the term "domestic septage." Under 40 C.F.R. § 503.9(f), "domestic septage" is:

> either liquid or solid material removed from a septic tank, cesspool, portable toilet, Type III marine sanitation device, or similar treatment works that receives only domestic sewage. Domestic septage does not include liquid or solid material removed from a septic tank, cesspool, or similar treatment works that receives either commercial wastewater or industrial wastewater . . .

In short, when waste and wastewater from humans or household operations enters a treatment works, the material is classified as "domestic sewage." 40 C.F.R. § 503.9(g). Then, a liquid, semi-solid or solid material forms within a treatment works from domestic sewage, and this material is "sewage sludge." 40 C.F.R. § 503.9(w). When liquid or solid material is removed from the treatment works, it is classified as "domestic septage" under 40 C.F.R. § 503.9(f). The term "sewage sludge" includes, but is not limited to, domestic septage.

As used in the Part 503 regulations, the terms "apply sewage sludge or sewage sludge applied to the land," mean "land application of sewage sludge." 40 C.F.R. § 503.9(a). The regulation at 40 C.F.R. § 503.11(h) lends clarity to the term "land application," defining it as:

> the spraying or spreading of sewage sludge onto the land surface; the injection of

Again, Respondent admits he was a person who applied domestic septage/sewage sludge to a forest within the meaning of 40 C.F.R. § 503.10(a). *See* First Amended Answer ¶¶ 43, 61; Compl. Ex. 39, 40. Thus, Respondent is subject to develop, and retain for five years, a Record of the Certification Statement required pursuant to 40 C.F.R. § 503.17(b)(6).

d) Under 40 C.F.R. § 503.17(b)(8), Respondent Must Develop and Maintain a Description of Meeting the Vector Attraction Reduction Requirements

Pursuant to 40 C.F.R. § 503.17(b)(8), when domestic septage is applied to agricultural land, forest, or a reclamation site, the person who land applies the domestic septage shall develop, and retain for five years, "a description of how the vector attraction reduction requirements in 40 C.F.R. § 503.33(b)(9), (b)(10), or (b)(12), are met." ("Record of Vector Attraction Reduction"). Again, Respondent admits that from May 2000 through mid-April 2002 he was a person who applied domestic septage/sewage sludge to a forest within the meaning of 40 C.F.R. § 503.10(a). *See* First Amended Answer ¶¶ 43, 61; Compl. Ex. 39, 40. Thus, Respondent is subject to develop, and retain for five years, a Record of Vector Attraction Reduction as required by 40 C.F.R. § 503.17(b)(8).

C. Respondent's Professed Ignorance Does Not Defeat Liability

Section 405 of the CWA unambiguously provides that the determination of "the manner of disposal or use of sludge is a local determination, *except* that" persons disposing of sewage sludge from a treatment works must comply with the federal regulations at 40 C.F.R. part 503 promulgated pursuant to Section 405(d) of the CWA. 33 U.S.C. § 1345(e)(emphasis added). As noted *supra*, Respondent does not argue that he did not dispose of sewage sludge from a treatment works for which federal regulations have been established pursuant to Section 405(d). Order on Complainant's Motion for Accelerated Decision on Liability at 7. *See* First Amended Answer ¶¶ 50, 51, 69, 70, 73, 74, 77, 78; Compl. Ex. 39, 40. Rather, throughout the course of this proceeding, Respondent does argue that he was ignorant of the federal law.[23/] First Amended Answer ¶¶ 50, 51, 69, 70, 73,

[23/] Respondent contends that he "was following guide lines and instructions supplied by the Brown County Health Department and the Southwestern District of the Ohio EPA," which never referred him to the Part 503 regulations, suggesting such reliance excuses noncompliance with federal regulations. First Amended Answer (continued...)

vol. 1, 19. In response to this statement, I noted my understanding that Respondent was "not contesting [his] liability in the sense . . . [of] denying counts one, two, three or four, in terms of liability," rather he was in essence admitting his failure to meet the Part 503 requirements while "arguing that he believed he was complying with some of the rules." Hr'g Tr. vol. 1, 20. Respondent affirmed that this assessment of his argument was correct. Hr'g Tr. vol. 1, 21.

Although the allegations in Count I and part of Count II[25/] of the Complaint were fully and finally adjudicated based on Respondent's pleadings in the Order on Complainant's Motion for Accelerated Decision on Liability, I nevertheless revisit these issues here. Further, the testimony and evidence presented during the hearing on this matter clearly establish Respondent's liability for the remaining counts, i.e. the portion of Count II not previously ruled upon in the Order on Complainant's Motion for Accelerated Decision on Liability as well as Counts III and IV. Specifically, Respondent's liability under Section 405(e) of the CWA for each of the alleged violations of the Part 503 regulations is discussed below, in turn.

1. Respondent Failed to Comply with Vector Attraction Reduction Requirements for Domestic Septage, Pursuant to 40 C.F.R. § 503.15(d)

In Count I of the Complaint, the Region alleges that "For each of the 1,092 truck loads of domestic septage applied to the Site," Respondent failed to meet the vector attraction reduction requirements in 40 C.F.R. § 503.33(b)(9), (b)(10), or (b)(12) as mandated by 40 C.F.R. § 503.15(d). Complaint ¶ 50. Based on several of Respondent's admissions in the Answer and First Amended Answer and on Respondent's failure to comply with the Order Granting Motion for a More Definite Answer, the Order on Complainant's Motion for Accelerated Decision on Liability held that Respondent violated 40 C.F.R. § 503.15(d) when land applying domestic septage to the Site from May 2000 to mid-April 2002.[26/]

[25/] Specifically, Respondent was found liable for the portion of Count II that alleged that he failed to comply with the Annual Application Rate Pollution Limits set forth at 40 C.F.R. § 503.12(c).

[26/] As previously discussed in the Order on Complainant's Motion for Accelerated Decision on Liability, Respondent admitted that he "did apply approximately 1246 truck loads of domestic septage from May 2000 to Mid-April 2002, following rules and specifications supplied to him by the Brown County Health (continued...)

Requirement"). 40 C.F.R. § 503.13(c). Here, according to information provided by Respondent in his First Response to the EPA information requests on August 13, 2002, the Nitrogen Requirement for the Site is 30 pounds of nitrogen per acre per year, which would allow for an annual application rate of 11,538 gallons per acre per year.[32/] Compl. Ex. 39. *See* First Amended Answer ¶¶ 59, 60.

The Order on Complainant's Motion for Accelerated Decision on Liability found Respondent liable under 40 C.F.R. § 503.12(c) for failure to comply with the annual application rate pollution limits, based on several of Respondent's admissions contained in Respondent's First Amended Answer.[33/] Respondent's admissions,

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[32/] I again emphasize that the figures for the Nitrogen Requirement and, derivatively, the AAR originate solely from information Respondent provided in his pleadings. This is appropriate considering the regulations place the burden of developing and retaining the Nitrogen Requirement on the septage pumper who land applies domestic septage. 40 C.F.R. § 503.17(b). In Respondent's August 13, 2002 Response to the EPA information requests, he admitted that "maybe 6 acres [of his Property was] used to dump on since June 1997." Compl. Ex. 39. Other estimates of the area of the 16-acre Site used for land applying domestic septage ranged from one to three acres. Compl. Ex. 15, 16. The approximate size of the Site, as used to calculate the AAR is 5.5 acres. First Amended Answer ¶ 66. Additionally, the accuracy of these figures is premised on Respondent's admissions and Complainant's allegations deemed admitted. *See* First Amended Answer ¶¶ 59, 60, 66. Further, neither the Region nor Respondent has disputed the Nitrogen Requirement or AAR calculations used throughout this proceeding.

[33/] As previously discussed in the Order on Complainant's Motion for Accelerated Decision on Liability, Respondent has admitted ownership of two trucks used to haul the collected domestic septage/sewage sludge, with each truck load averaging at least 600 gallons of domestic septage/sewage sludge. First Amended Answer ¶ 64. Respondent admitted that he applied at least 852,200 gallons of domestic septage/sewage sludge to the Site between May 1999 through mid-April 2002. More significantly, Respondent admitted to applying domestic septage/sewage sludge to the Site in at least the following annual application rates alleged in the Second Amended Complaint: 35,781 gallons per acre per year from May 1999 through April 2000; 42,218 gallons per acre per year from May 2000 through April 2001; 78,581 gallons per acre per year from May 2001 through mid-April 2002. These rates were based on an estimated acreage of 5.5 acres for the portion of the Site utilized for land applying. *See* Order on Complainant's Motion for Accelerated Decision on Liability. Thus, based on Respondent's (continued...)

Hr'g Tr. vol. 2, 28-29). I disagree with the Region's characterization of these facts as prior violations.

Respondent's alleged failure to comply with the local BCHD Rod and Cover Practices, which are not in the record before me nor presented as law, is not relevant to a discussion concerning a statutory factor designed to capture, in this case, any prior history of federal CWA violations. Contrary to what Complainant argues in its post-hearing brief, a mere resemblance between the structure and goals of local practices and federal regulations is not enough to make compliance history concerning the former applicable to the latter. *See* Compl.'s Post-Hr'g Br. 49-51. Facts relating to Respondent's alleged failure to comply with the BCHD Rod and Cover Practices are more pertinently discussed with regard to Respondent's culpability. *See* Hr'g Tr. vol. 2, 167-70.

Moreover, it would have been more appropriate for the Region to extend the time period of ongoing Part 503 violations alleged in the Complaint back to 1997 than to deem such previous activity of alleged noncompliance "prior history." EPA's July 9, 2002 Administrative Order requested Respondent's Part 503 compliance information dating back to June 1997. Hr'g Tr. vol. 2, 28-29. As the Region summarizes in its post-hearing brief, the hearing revealed that Respondent's compliance with the applicable Part 503 recordkeeping requirements was flawed dating back to June 1997. Compl.'s Post-Hr'g Br. 51 (citing Hr'g Tr. vol. 2, 46-48, 51-58, 65-66, 70-73, 79-82). Complainant argues, "These instances of non-compliance all pre-date the violations alleged in the Complaint, and U.S. EPA is not seeking a penalties [sic] for the years outside of those pled . . . [which are] fairly considered to reflect Barber Trucking's prior history of non-compliance with the Part 503 requirements and the CWA." Compl.'s Post-Hr'g Br. 51. I do not agree that this is a fair consideration.

The EAB has held that "full compliance history" under the CAA includes consideration of a respondent's prior notice(s) of violation, which in that case arrived in the form of an Immediate Compliance Order ("ICO"). *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 525-26 (EAB 1998). The *Ocean State Asbestos* case is a Clean Air Act ("CAA") case that utilizes similar, but different, statutory penalty factors.[59] 7 E.A.D. 522 (EAB 1998).

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[58] (...continued)
determining the appropriateness of the proposed penalty.

[59] The equivalent factor for the CWA's "any prior history of such violations" is the CAA's "violator's full compliance history and good faith efforts to comply." 42 U.S.C. §7413(e). (continued...)

At minimum, the Region did demonstrate that Respondent can be charged with some knowledge of the existence of the Part 503 regulations and acted with wanton and reckless disregard for the regulations' requirements. Even so, as the Region has pointed out, Respondent persistently claims he lacked knowledge of the federal regulations governing the land disposal of septage during the time period of May 2000 to mid-April 2002. Compl.'s Post-Hr'g Br. 54 (citing Hr'g Tr. vol. 3, 206). In response, the Region cites the case of *In re Pepperell* for the principle that Respondent's knowledge of the existence of the regulations bestowed upon him a duty to make further inquiries to determine the substance of the regulations. Compl.'s Post-Hr'g Br. 55 (citing *In re Pepperell Associates*, 9 E.A.D. 83, 109 (EAB 2000), *aff'd* 246 F.3d 15 (1st Cir. 2001). The Region persuasively argues that, as in *Pepperell*, "'[t]his case is not about regulatory confusion, but about indifference.'" *Id*. At 112. As the Region further contends, Respondent could have easily contacted the OHEPA or EPA to determine his obligations. Compl.'s Post-Hr'g Br. 56. Respondent is culpable for his passive approach towards his regulatory responsibilities, a behavior that is unacceptable and conflicts with the goals and undermines the purposes of the CWA.

As a further matter, I note that the record shows that the BCHD, through Mr. Griffith, knew as of October 12, 2000 that Respondent was land applying domestic septage on his Property in violation of federal law. Hr'g Tr. vol. 2, 239-41. *See* Compl. Ex. 92, 105. It is also clear that Mr. Griffith informed the Brown County Board of Health at a February 7, 2001 meeting, at a minimum, that Respondent's Site was not in compliance with "Ohio EPA guidelines."[71/] Compl. Ex. 21. Nevertheless, the BCHD issued a permit to haul waste[72/] to Respondent on January 3, 2002, which

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[71/] Mr. Griffith denies this, arguing that the Secretary misinterpreted his statement in her transcription of the meeting and that the only so-called guidelines he was aware of at that time were the local BCHD Rod and Cover Practices he described. Hr'g Tr. vol. 2, 282. Given that the February 2001 meeting occurred less than two months after Mr. Griffith's receipt of the December 11, 2000 facsimile from Mr. Shultz of OHEPA, detailing the scope of the federal regulations at 40 C.F.R. Part 503, and that the existence of any "Ohio EPA Guidelines" was not placed into the record, it is more likely than not that Mr. Griffith in fact informed the Board about the federal EPA regulations. Further, the record discloses that there are no Ohio State or Brown County regulations concerning the disposal of sewage sludge. Hr'g Tr. vol. 1, 170, 203; Hr'g Tr. vol. 2, 220; Hr'g Tr. vol. 3, 142, 159.

[72/] Contrary to Respondent's averments, there is no evidence that he was granted a "permit" or "license" from the BCHD to land

(continued...)

2003). For example, a violator may gain economic benefit from avoiding costs of compliance or by obtaining a competitive advantage over similarly situated competitors when the violator is able to offer goods or services at a lower cost, thereby increasing sales and its profit margin over time. *In re B.J. Carney Industries, Inc*. 7 E.A.D. 171, 208 (EAB 1997) (discussing the types, importance, and standards for determination of economic benefit), *appeal dismissed as moot*, 200 F.3d 1222 (9th Cir. 2000); *accord United States v. Smithfield Foods, Inc.* 191 F.3d 516, 530 (4th Cir. 1999)("As part of the economic benefit analysis, the court must apply an interest rate to determine the present value of the avoided or delayed costs."), *aff'g in part, rev'g in part*, 972 F. Supp. 338 (E.D. Va. 1997).

As the Region highlighted in its post-hearing brief, the EAB has expressed the view that:

> A complainant need not demonstrate the exact amount of economic benefit enjoyed from a violation; a reasonable approximation will suffice. If the record supports a partial economic benefit, and the only choice is between finding a partial economic benefit or none at all, it is error to find none.

In re B.J. Carney Industries, Inc. 7 E.A.D. 171, 173 (EAB 1997). Economic benefit, as a whole, is difficult to prove. Recognizing this difficulty, courts have held that "[t]he determination of economic benefit . . . will not require an elaborate or burdensome evidentiary showing. *Reasonable approximations of economic benefit will suffice*." *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc*. 913 F.2d 64, 80 (3d Cir. 1990)(*quoting the legislative history of the CWA* S. Rep. No. 99-50 at 25 (1995)(emphasis in original), *aff'g in part, rev'g in part*, 720 F. Supp. 1158 (D. N.J. 1989). *See United States v. Mun. Auth. of Union Township*, 929 F. Supp. 800, 806 (M.D. Pa. 1996) (determination of economic benefit is somewhat speculative and the nature of the factor results in imprecise quantification), *aff'd*, 150 F.3d 259, 263 (3rd Cir. 1998).

At the evidentiary hearing, EPA witness Mr. Aistars expressed his opinion that Respondent saved anywhere from $22,000 to at least $27,000 by avoiding the cost of compliance with the Part 503 Subpart B regulations, thereby increasing his profits.[78/] Hr'g Tr.

[78/] These figures represent an approximation devised from taking the sum total of what it would cost Respondent to properly dispose of the estimated 1,092 loads of domestic septage he land (continued...)